(1) SUPREME COURT, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States
October Term, 1996

EDWIN A. NEAL,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States District Court
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the 5th Amendment right against double jeopardy bars re-trial of a defendant when the court dismissed the criminal Indictment, **sua sponte**, after the close of the government's case, and the defendant's attorney stated on the record contemporaneously that defendant was not asking for the dismissal of the Indictment as ruled by the trial Judge.

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JURISDICTIONAL STATEMENT

This case was filed in the U.S. District Court for the Western District of Kentucky, Louisville Division based on a criminal Indictment of defendant Edwin A. Neal pursuant to Title 26 U.S.C. Sec. 7203. Upon the order of the U.S. District Court Judge dismissing the Indictment, the United States appealed to the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") whose decision was rendered on August 9, 1996 reversing and remanding the case to the U.S. District Court. By Order dated September 10, 1996, the Sixth Circuit granted an extension of time for petitioner Neal to file his petition for rehearing. The petitioner timely filed an application for rehearing. The Sixth Circuit rendered its decision on October 3, 1996 noting that it had received the petition for rehearing en banc, and upon no vote suggesting rehearing en banc, referred the matter to the original panel to be heard as a petition for rehearing. Thus the petition was considered as a petition for rehearing, not a petition for rehearing en banc. By Order dated October 3, 1996, the original panel of the Sixth Circuit denied petitioner's request for rehearing. This Court's jurisdiction is based on 28 USCS Sec. 1254(1), and Supreme Court Rule 12.

STATEMENT OF THE CASE

The issue is securing the petitioner's 5th Amendment right against double jeopardy. The petitioner opposed the trial Judge's dismissal of the Indictment (later held as error) and cannot be twice be placed in jeopardy when petitioner did not seek the relief found to be error on appeal.

Petitioner Edwin Neal (sometimes referred to herein as "defendant Neal" to aid in understanding quoted citations) was criminally charged with violating Title 26 U.S.C. Sec. 7203 which requires a corporation to file IRS Form 941. That form identifies corporate tax liability. After the government closed its case, the defendant Moved for an Acquittal based on the insufficiency of the facts presented into evidence by the government that petitioner Neal was the designated corporate official whose tasks included the filing of the tax forms. The content of the defendant's motion for acquittal is the heart of this appeal, and was recorded in a written transcript.[1]

The trial Judge stated on the record that he was <u>not</u> granting the Motion for Acquittal, by rather that he was ruling that the Indictment itself was defective as a matter of law in that no person could

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[1] References herein to the Transcript refer to the original Transcript and not to the appendix page number. The appendix recites the original transcript page numbers for the selected quotes.

have personal liability imposed on him for violation of the statute at issue.

The government counsel, on the record, clarified the trial Judge's ruling, stating specifically that granting a Judgment of Acquittal would be a ruling on the insufficiency of the evidence, and that the Judge was not ruling on the insufficiency of the evidence. The government counsel then stated that the trial Judge's "... proper remedy would be to dismiss the indictment." See Transcript at p. 66. The trial Judge agreed, and specifically stated that he was not ruling that the evidence was insufficient, but instead was dismissing the Indictment.

The defense attorney stated on the record at the time of the Judge's ruling that the defendant was <u>not</u> moving for the dismissal of the Indictment - certainly opposite the finding that he "asked for" the Judge's ruling. However, the trial Judge dismissed the Indictment itself as legally defective.

The government appealed the dismissal of the Indictment to the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals ruled that the defendant's Motion for Acquittal was a combined factual/legal issue, and that the trial Judge had granted the legal portion of defendant's motion. This appeal seeks to correct that error by the Sixth Circuit, since defendant's Motion for Acquittal was solely based on the insufficiency of the facts presented into evidence by the government, and even specifically stated

that petitioner was not moving for dismissal of the Indictment.

Based on the finding that petitioner's Motion asked in part for the legal relief of dismissal of the Indictment, the Sixth Circuit determined that double jeopardy did not bar the government's appeal, and ruled that the trial Judge's ruling that the Indictment was legally deficient was error by the trial Judge. The Sixth Circuit opinion further stated that if the defendant had not requested the dismissal of the Indictment in its motion, then double jeopardy would bar retrial.

However, because the Sixth Circuit found that the defendant had asked for the legal relief of dismissal of the Indictment as one part of the defendant's supposed "factual/legal combined motion," the Sixth Circuit found no bar to retrial of the defendant and ordered the case remanded to the trial Court for retrial. This appeal follows.

Petitioner contends that his motion was a purely factual motion, and there was no request for the legal relief of dismissal of the Indictment. Accordingly, double jeopardy bars retrial.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The 5th Amendment Constitutional right against double jeopardy would be violated unless the plain error of the Sixth Circuit's finding that the defendant's motion for acquittal was a combined factual/legal motion is reversed.

The issue before this Court is one of Double Jeopardy, an extremely significant Constitutional right of this criminal defendant. Petitioner Neal has been once placed at jeopardy. The jury has been discharged as a result of the sua sponte order of the trial Judge. At trial, the government presented its evidence and rested. The Judge dismissed the Indictment as legally insufficient, sua sponte. The Sixth Circuit ruled that the dismissal of the indictment by the Judge was legal error. Sixth Circuit Opinion, at appendix, p. 1a. 2a.

The law regarding double jeopardy is: Unless the defendant asked for the action which was later ruled error, double jeopardy bars any retrial. [Citations infra.].

Here, the defendant's Motion for Acquittal was based on the insufficiency of the facts. The trial Judge dismissed the Indictment as a matter of law. When the Judge dismissed the Indictment, the defense attorney specifically stated that he as not asking for the Judge's action of dismissing the Indictment. (See Transcript, at p. 66).

The Sixth Circuit held that defendant's motion was a combined factual/legal motion:

> "Defendant argued in the alternative, and the district court agreed with his legal argument. The fact that legal and factual arguments are raised in the same motion should not bar appellate review of dismissal as long as the district court confines itself to the legal issue." See Sixth Circuit opinion, at p. 6.

The Sixth Circuit was plainly wrong in ruling that the defendant had asked for the "legal argument" of dismissal of the indictment, particularly when defense counsel specifically stated that he was "not" asking for that relief. Transcript at Tr. p. 66. Retrial of this case violates defendant's 5th Amendment Constitutional protection against double jeopardy.

The Sixth Circuit opinion recites case law confirming that the Motion for Acquittal was a factual issue only since that Motion placed at issue "whether defendant Neal was an officer responsible for filing the corporate returns:

> "**Lumetta v. United States**, 362 F2d 644, 647 (8th Cir. 1966)(holding that whether an officer is responsible for filing a corporation's returns and therefore liable under Sec. 7203 for failure to do so is factual question)." Sixth Circuit opinion, appearing on appendix page 11a.

A plain reading of the defendant's Motion for Acquittal shows that it never asked for the dismissal of the Indictment, and therefore the Sixth Circuit is plainly wrong, and its ruling will deprive this criminal defendant of his Constitutional right not to be placed in criminal jeopardy twice.

2. The verbatim, written transcript of defendant's motion for acquittal conclusively proves that defendant's motion was based on the lack of facts presented by the government alone. Having opposed the trial Judge's sua sponte dismissal of the Indictment, the defendant cannot be held to have requested it, and therefore double jeopardy bars retrial of this defendant.

Defendant Edwin Neal was charged with violating Title 26 U.S.C. Sec. 7203 which requires a corporation to file IRS Form 941. That form documents the taxes owed by the corporation for which defendant Neal worked.

After the government closed its case, the defendant moved for an acquittal.[2]

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[2] The defendant's Motion for Acquittal contained three (3) issues. Two are irrelevant: venue, and lack of intent. At issue here is only the first recited motion: the failure of the government to present any "facts" in evidence which established that defendant Neal had the

The transcript very clearly states that the defendant's motion for acquittal was based on the lack of evidence, i.e., the facts the government failed to introduce:

"THE COURT: We have a motion for acquittal.

MR. GREENE [defense counsel]: Yes, we do.

THE COURT: State your motion.

MR. GREENE: Your Honor, defendant moves for judgment of acquittal based on several grounds, one of which is there is no legal requirement in existence under the law through the **facts** adduced so far that would show Mr. Neal had the duty or was under the duty to file the returns in question." Transcript of Bench Conference and Chambers Proceedings, p. 13, underlining and emphasis added.

While the corporate by-laws would normally state the officer responsible for specific duties, they were not introduced as evidence by the government. See Transcript, at p. 16. What were Mr. Neal's corporate duties? Mr. Neal could have been responsible for removing the trash or computer repair, or other corporate duties, but there was no factual evidence introduced that defendant Neal had the corporate duty to file the IRS forms. That was the basis of the defense attorney's motion for acquittal: facts.

MR. GREENE [defense attorney's motion]: "The government has not

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"duty to file" the IRS forms at issue for the corporation.

> introduced the by-laws. We have no idea what they say. It would not be reasonable for a jury to conclude, a reasonable jury to conclude Mr. Neal was the person responsible for filing or could have filed the return for any of these quarters on time; and the same argument, once that date is past, there is no ability to violate this statute; and that would be the basis of my motion." Transcript at p. 16, 17, underlining added.

Defense counsel's Motion for Acquittal never asked for a ruling as a matter of law that the Indictment must be dismissed as defective; that was the Judge's sua sponte action, contrary to the defendant's motion as stated in the record. [See further citations, infra.].

The Judge never ruled on the defendant's motion for acquittal for the insufficiency of the facts; the Judge said "state your motion," and the defense attorney stated its motion for acquittal based on the insufficiency of the facts. [Transcript, at p. 13, additional citations, infra.]. Instead, the Judge raised a different issue on his own. The Judge dismissed the Indictment. The indictment was dismissed "as a matter of law" on the Judge's sua sponte grounds that no one could be found liable personally under any circumstances - a position with which the defense counsel disagreed. Defendant did not ask for the indictment to be dismissed and specifically stated in the transcript that defendant was not moving to dismiss the indictment:

> "Mr. Greene [defense counsel]: Can I interpret Mr. Campbell's statement to be a motion by the government to dismiss the indictment because I have not so moved?" Transcript, at p. 66, underlining added.

The transcript proves that the defense motion was based on the lack of facts, not a ruling as a matter of law on the invalidity of the indictment.

Instead of acquitting petitioner, the Court raised a separate issue, sua sponte. The Court dismissed the Indictment based on the Court's opinion that there was no legal basis for the Indictment to impose personal liability - it did not grant the acquittal requested by the defendant.

Sixth Circuit's opinion. The opinion states that the trial Court's reasoning in dismissing the Indictment was based on the trial Judge's review of the Code sections, and that the trial Judge found that the law does not impose a "requirement to file a return." Opinion, at appendix p. 4a ("The district court dismissed the indictment because...").

The Sixth Circuit's opinion addresses Double Jeopardy for purposes of appellate review upon the government's appeal. The Sixth Circuit misstates the defendant's motion as a combined factual/legal motion - a defense motion specifically recited on the written record and verifiable by this Court as requesting only the relief of acquittal based on insufficiency of the facts.

Further, the Sixth Circuit states (the correct law) that if the dismissal "was not sought by defendant" then double jeopardy would attach. See Opinion at appendix p. 7a, including footnote 2 citations. Therefore, even the Sixth Circuit itself agrees that if it is wrong in its conclusion that the defendant sought the "legal relief" of dismissal of the Indictment, then double jeopardy would bar retrial of the defendant.

The issue on appeal. Did the defendant "seek dismissal of the indictment" as found by the Sixth Circuit, or not. The transcript is dispositive: the defendant's motion was based on lack of governmental facts, not on the invalidity of the statute itself (law).

Let us review the defense attorney's argument. A company has many employees. Different employees have different duties. All employees are not required to file tax forms. Only those who hold a corporate "duty to file" are the individuals who can be held liable for the failure to file. The case at bar appears to be a case of first impression because Mr. Neal denies he had the duty to file as a corporate officer (or, in other words, the individual designated by the corporation as having one task of his employment being the obligation to file the corporate tax forms). (See Transcript, at p. 57). The other cases cited to the trial Judge involved circumstances in which the individuals admitted they held the corporate duty to file. (See transcript, at p. 53, line 15 through p. 54 line 54, line 13). In other words, this is the

first reported case where a defendant denied that he was the person designated by the corporation to file the tax returns, and therefore the defense motion based on the government's failure to submit sufficient facts in evidence to establish defendant Neal as the designated individual is a matter of first impression to the trial court. The defense attorney was attempting to have the Judge rule that there was a clear failure by the government to place facts in evidence, and if the Judge did not so rule, then the defense attorney would seek the same ruling from the jury.

The defense attorney said:

> "I think I have submitted jury instructions that the by-laws would be controlling to show who had the duty to do what in the corporation." Transcript, at p. 59, underlining added.

If the defense attorney's motion was for a ruling as a matter of law, then there is no need for the defendant to refer to "jury instructions." The jury is the finder of facts; jury instructions are only relevant if the issue is one dealing with facts.

There are two (2) separate places which state the relief sought by the defendant as being a factual insufficiency. First, the motion for acquittal which specifically refers to the "lack of evidence" - a factual issue. (Defense counsel states there is no requirement "... through the facts adduced

so far..." that Mr. Neal had the duty ... to file." Transcript, at p. 13).

Secondly, when the Judge has finished the extensive discussion of the "legal issue of dismissal of the indictment," defense counsel Greene said "I did not so move". See Transcript at p. 66.

Pro se appellate brief by Mr. Neal. Perhaps the fact that the defendant filed his appellate brief pro se had some effect on the Sixth Circuit's mis-statement of the motion by the defendant. However, a review of the language of the motion as contained in the record, verbatim, conclusively shows that the defendant's motion was not a combined legal/factual motion for acquittal as claimed by the Sixth Circuit, but a purely factual motion.

Defense motion for acquittal references to "factual" insufficiencies of the government's case.

If it is true, as the Sixth Circuit opinion states, that the "defense motion" contained both legal and factual issues, and the Judge granted the "defense motion" on the "legal motion" portion, then defendant would agree that double jeopardy would not be violated by a retrial. That never happened. A plain reading of the defendant's motion confirms the defendant sought only an acquittal based on the factual deficiencies in the government's rested case. Defendant's motion makes (repetitious and redundant) references to the "lack of facts" in the government's case which conclusively prove that the

defendant's motion dealt only with the government's failure to present any "fact" which showed that defendant Neal was the individual in the corporation with a "duty to file IRS forms."

The entire transcript of the Motion is attached in the Appendix so that the context can be reviewed. However, the following ten (10) exchanges conclusively establish that the defendant did not have a combined factual/legal motion for acquittal, but rather defendant's motion was purely based on facts alone:

> 1. Defendant's verbatim motion states: " ...there is no legal requirement in existence under the law through the facts adduced so far that would show Mr. Neal had the duty or was under the duty to file the returns in question." Transcript, at p. 13, underlining added.
>
> 2. MR. GREENE (defense attorney): "The government has not introduced the by-laws. We have no idea what they say. It would not be reasonable for a jury to conclude, a reasonable jury to conclude Mr. Neal was the person responsible for filing..." Transcript, at p. 16, lines 21-24, underlining added.
>
> 3. "THE COURT: All right. Then last is this legal-requirement argument. I told you all I had some reservations about this before the trial was adjourned this morning for lunch. What is your argument that the government hasn't shown a legal

argument?

MR. GREENE: I'm sorry, Your Honor. I thought you were talking to the government.

THE COURT: No. Its your motion. I would like you to amplify what your grounds are before I ask them to respond.

MR. GREENE: Your Honor, Section 7203 makes it a crime for a person required to file a tax return to willfully fail to timely file such return. So only the person who is required to file the return can commit the crime." Transcript, at p. 26, 27, underlining added.

Note: Nowhere does defense counsel state that the Indictment itself is "legally defective" as the Sixth Circuit's opinion finds. Defense counsel's "grounds" are based on the government's failure to introduce facts to show that Mr. Neal was the individual employed in the corporation with the corporate duty to file IRS forms, as opposed to mopping the floors or repairing the computers or ordering supplies.

4. MR. GREENE (defense counsel): The government has cited Section 7343, which says that when the word, person, is used in this chapter, which includes Section 7203, it would also include the person under the duty to perform the act.

Now it doesn't explain who that person under the duty to perform the act is." Transcript, at p. 27, 28, underlining added.

Note: Defense counsel is conceding that whoever that person is who has the "duty" for the corporation is liable under Section 7203 - which is directly contrary to the trial Judge's ruling that the indictment is legally insufficient. In other words, the defense attorney is stating that he believes there is personal liability imposable under this Indictment, that the trial Judge should not dismiss the Indictment as a matter of law. The defense counsel is focused only on the factual defense that Mr. Neal was never designated by the corporation as the employee with the "duty to file tax forms" as an element of his employment by the corporation. This citation conclusively negates the Sixth Circuit's conclusion that the defendant was making a "legal argument to dismiss the Indictment." The exact opposite is shown by the transcript.

> 5. THE COURT: First of all, with respect to the term, duty. What is the position of the government as to whether this is a legal or factual definition of the word, duty?
>
> MR. CAMPBELL [government attorney]: Judge, in this context, the word, duty, is a factual determination. ... The duty of the particular officer or employee is a factual determination for the jury to decide if that person was the person within the corporation who was responsible for preventing the corporation's violation." Transcript, at p. 33, underlining added.

> 6. "THE COURT: So you think that whether or not Mr. Neal had a duty to

file these [IRS forms] for the corporation is a factual matter?

MR. CAMPBELL [government counsel]: Under 7343, correct."

THE COURT: Are you aware of any authority under 7343 which defines the parmeters of the duty under 7343? In other words, how does one measure the duty? Does one apply one's common sense? Does one simply assemble a bunch of facts and from that, derive a duty; or is there any case authority that you're aware of that describes how and under what circumstances the duty under 7343 is to be defined?

MR. CAMPBELL: Judge, I'm not aware of any cases that define or give guidance to the Court on how the word, duty, under 7343 is to be applied in the trial setting.

THE COURT: Well, we have looked at a number of cases in which they have talked in terms of duty; and the cases seem to comment on facts, in other words, whether a person had control over books and records, corporate records, et cetera; but this would apply to factual determinations." Transcript, at p. 35, underlining added.

7. The colloquy between the Court and government's counsel regarding the statutory source (Sec. 6672) of requiring a person to file for a corporation:

MR. CAMPBELL: That it gives rise to a requirement for a person who is a responsible party to make a return on behalf of the corporation because

> he accepts responsibility to account for the taxes.
>
> MR. GREENE [defense counsel]: Does not say he has responsibility. It says: "Anyone with the responsibility." Transcript, at p. 38, underlining added.

Again, defense counsel focusing on the factual issue of the lack of evidence that Mr. Neal actually had a corporate responsibility as the one who was to file the IRS forms. Defense counsel is focusing on the person "with" the responsibility - a factual issue. It is agreed that whoever actually "has" the corporate responsibility for filing the tax forms would then be subject to liability; defense counsel repeatedly focuses on the factual predicate that there were no facts introduced by the government to establish defendant Neal as the corporate employee "with" the assigned task of filing the tax forms.

> 8. Distinguishing this case from all others tried under this statute: Mr. Greene (defense counsel): "... and the two or three cases I found, 7343 was not an issue and people admitted they were the ones who had the duty to file the return. One was an attorney, and two were sole operating officers who essentially admitted it. We don't have that situation here." Transcript, at p. 53, 54, underlining added.

Again, the factual distinction: Mr. Neal denies he was the corporate official whose corporate duty was to file tax

returns. This is the reaons why defense counsel stated that this was a case of first impression - only defendant Neal has claimed that he did not have a task assigned to him by the corporation of filing its tax forms. Defense counsel Greene said there were no "lists of factors to consider" in making this factual determination because no other case has ever litigated the factual dispute of "who is the designated corporate individual assigned to file tax forms."

> 9. "MR. GREENE: Judge, the question you want to focus on is how does the duty arise. How did we know Mr. Neal had the duty?" ...
>
> THE COURT: Well, certainly the by-laws is one factor.
>
> MR. GREENE: The factor though relates to collection of taxes, not who had the duty to file the return; and that is the problem here. There is no case law on point. There's no instruction in any of the IRS publications, no regulations, nothing in the Internal Revenue Code that says who in the corporation has the duty to file." Transcript at p. 56, underlining added.

Note: the by-laws were not introduced into evidence by the government. See Transcript, at p. 16, line 21.

> 10. "MR. GREENE: This is a case of first impression, that as far as I know, no one has ever - no one has ever tried to prosecute someone who resisted it on the ground of "I'm not

> the person required. The case law that I found, the people admitted they were the person. ...
>
> I wasn't the person required." Transcript, at p. 57, underlining added.

There cannot be any doubt that defense counsel Mr. Greene was consistently arguing that the government introduced no **evidence** that defendant Neal was the corporate officer with the "duty to file the return" - a factual issue. Defense counsel is repetitious that his motion for acquittal is based on a factual insufficiency.

The trial Judge's ruling. After the Judge's explanation of his reasoning, he states that he is granting the judgment of acquittal, but then is corrected by the government:

> "MR. CAMPBELL [government attorney]: Judge, if I could ask for clarification. My understanding is if there is no legal basis for the indictment, then the remedy is to dismiss the indictment. Judgment of acquittal is a finding that there is an insufficiency of the facts to support the charge, and I think the Court is ruling there is no law to support the charge. So the proper remedy would be to dimiss the indictment.
>
> THE COURT: Perhaps that's correct. Perhaps that's correct. I am not ruling that the evidence is insufficient. I am ruling that the government has not shown that there

> is a legal grounding for the charge here based on what has been shown so far in this case. So I was prepared and I am prepared to dismiss the indictment in the case; ...
>
> MR. GREENE [defense counsel]: Can I interpret Mr. Campbell's statement to be a motion by the government to dismiss the indictment **because I have not so moved**?" Transcript, at p. 66, underlining and emphasis added.

The defense counsel moved for a judgment of "acquittal." Even the government counsel agrees that a judgment of "acquittal" is a finding of an insufficiency of the facts. The trial Judge specifically rejected that he was granting an acquittal - the specific relief sought by defense counsel in its motion.[3] Instead, the Judge ruled that he

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[3] Defendant constantly underlines the word "motion" because the Sixth Circuit claims that the defendant's motion contained both legal and factual arguments. The Sixth Circuit opinion states: "Defendant argued in the alternative, and the district court agreed with his legal argument. The fact that legal and factual arguments are raised in the same motion ..." Sixth Circuit opinion at p. 6, underlining added.

Thus, if this Court reviews the defendant's motion and finds that there is no motion from the defendant containing any legal argument - as defendant has presented here - then the Sixth Circuit's entire opinion fails and must be reversed, with double jeopardy attaching, barring

was "dismissing the Indictment." The defense counsel never asked for a dismissal of the Indictment and specifically stated that he has "not so moved."

The Sixth Circuit committed plain error in its finding that the defendant had asked for the legal relief of dismissal of the Indictment. The record is directly contrary to such a conclusion.

Double jeopardy bars retrial of defendant Neal. Once it is clear that defendant Neal did not ask for the legal relief of dismissal of the indictment, it follows that the 5th Amendment bar against placing criminal defendants in double jeopardy applies to this case.[4]

> Where defendants did nothing to initiate dismissal of a case, but rather, it was the sole unprompted act of the trial judge in response to the absence of the state's witnesses, this clause precluded retrial, and the same was true whether the trial judge's action was viewed as acquittal or as dismissal resulting

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any retrial of the defendant.

[4] The Sixth Circuit's opinion acknowledges that if the defendant did not ask for the relief found on appeal to be legal error, then defendant "would have a valid argument" that double jeopardy bars re-trial. See Opinion, at p. 6. This point is therefore given small attention since it is virtually conceded.

from judicial indiscretion. People v. Wiley, 1979, 389 N.E.2d 1283, 27 Ill.Dec. 875, 71 Ill.App.3d 641.

Where a midtrial dismissal is granted on the ground, correct or not, that defendant simply cannot be convicted of the offense charged, further prosecution is barred by this clause. Lee v. U.S., Ind. 1977, 97 S.Ct. 2141, 432 U.S. 23, 53 L.Ed. 2d 80.

Upon the improper sua sponte declaration of a mistrial by the trial judge, retrial is precluded by the double jeopardy clause. Dunkerley v. Hogan, C.A. Vt. 1978, 579 F2d 141, certiorari denied 99 S.Ct. 872, 439 U.S. 1090, 59 L.Ed.2d 56.

When a mistrial is declared sua sponte by the court, defendant is precluded from deciding whether or not to take the case from the jury, a decision in which the defendant has a significant interest. U.S. v. Martin, C.A. Ark. 1977, 561 F2d 135.

Where a mistrial is declared, not in response to a motion by defendant, but by the trial court sua sponte, this clause requires that a more stringent test be applied in determining whether reprosecution is permissible. U.S. v. DiSilvio, C.A.Pa. 1975, 520 F2d 247, certiorari denied 96 S.Ct. 447, 423 U.S. 1015, 46 L.Ed.2d 386.

Clearly jeopardy attached in the case at bar. Jeopardy attaches when the jury is empaneled and sworn. U.S. v. Boyd, 566 F2d 929 (1978), at p. 932, additional citations omitted. In the case at bar, the government had concluded all of its evidence and rested. (See Sixth Circuit opinion, at p. 2, 3).

Defendant's Constitutional right to have his case heard before a single tribunal. There can be no doubt, after reading the entire transcript that the defense motion was not based on the argument that the Indictment itself was "legally defective" as ruled by the trial court. That finding was the Court's and the Court's alone. The defendant is entitled to a single trial of criminal charges before a single tribunal.

> The double jeopardy clause protects the defendant's valued right to have a trial completed by a particular tribunal. U.S.C.A. Const Amend. 5, U.S. v. Bauman, 887 F2d 546, certiorari denied 110 S.Ct. 1128, 107 L.Ed.2d 1034; Talamas v. U.S., 110 S.Ct. 1128, 107 L.Ed2d 1034; Cary v. U.S., 110 S.Ct. 1128, 107 L.Ed.2d 1034.
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> The defendant is Constitutionally entitled to proceed to verdict once jeopardy has attached. A sua sponte declaration of mistrial without the defendant's consent would deny him that right and retrial would constitute double jeopardy. Willis v. Kemp, 838 F2d 1510, rehearing denied 845 F2d 1032, certiorari

denied 109 S.Ct. 1328, 103 L.Ed.2d 596.

A defendant goes free when a mistrial occurs, provided the defendant neither requested nor consented to the mistrial. U.S. v. Goland, 897 F2d 405.

Defendant did not "consent" to a mistrial within the meaning of double jeopardy requirements, simply because he called the court's attention to alleged improper conversations between a witness and the prosecuting attorney on which the mistrail declaration was based. Lovinger v. Circuit Court of the 19th Judicial Circuit, Lake County, Illinois, 845 F2d 739; certiorari denied 109 S.Ct. 136, 488 U.S. 851, 102 L.Ed.2d 108.

When a mistrial is declared, double jeopardy clause precludes a retrial of the defendant unless the defendant consented to the mistrial. U.S. v. Crotwell, 896 F2d 437.

Formal objection to a declaration of a mistrial is not necessary to show lack of consent of the defendant. Abdi v. State of Georgia, 744 F2d 1500, rehearing denied 749 F2d 733, certiorari denied 105 S.Ct. 1871, 471 U.S. 1006, 85 L.Ed.2d 164.

CONCLUSION

The defendant's Motion for Acquittal clearly stated that "... through the facts adduced so far..." defendant Neal did not have the "duty to file" the corporate returns. (See 6th Cir. opinion, at appendix p. 3a). The 6th Circuit went on to conclude that the government, upon inquiry by the Judge, was unable to identify any "regulations" requiring a corporate filing - completely unrelated to the defense attorney's stated motion for acquittal on the lack of any fact showing that defendant Neal was never named by the corporation as the person who was to file any tax forms - an admitted factual defense.

As is clear from the repetitious, redundant references to jury instructions, factual issues, and even the government's own agreement that the issue of "who had a duty to file a corporate tax form" was a factual issue (see citations in para. 5 above), the Sixth Circuit must have been confused in saying that defendant's motion included the request for legal dismissal of the Indictment itself. Nowhere in the transcript does defendant's motion ask for dismissal of the Indictment; defendant even stated that he was not asking for that legal relief. (Citation supra.).

Most likely, defendant Neal's pro se appeal brief failed to articulate clearly enough to the Sixth Circuit the difference between a factual motion for acquittal, as opposed to the sua sponte Court's legal ruling involving the non-existence of IRS regulations on which the entire Indictment

itself was dismissed. The 6th Circuit notes that the pro se brief by defendant-appellee Neal said that he had "no input whatsoever as to the [judge's] decision to dismiss the indictment." (See Sixth Circuit opinion, at p. 6). In reading the transcript, it is clear that the trial Judge initiated the dismissal of the indictment, and clearly stated that he was not ruling on the defense motion of a factual insufficiency of the evidence. However, it is also clear that the trial Judge engaged in an extended discussion with the government counsel on the legal insufficiency of the indictment. To the extent that the defense counsel may have had any comment on the Judge's initiated legal issue, there can be no doubt that the defense did not ask for a dismissal of the Indictment - defense counsel stated so specifically.

In fact, the defense counsel articulated the basis of why there could be criminal liability for any individual - provided that the individual was the corporate designee, the individual with the "duty to file tax forms for the corporation." (See para. 4, supra.). That is, the defense attorney articluated the argument against the trial Judge's dismissal of the Indictment.

Even the government agrees that the determination of "who" has the "duty to file tax forms" for a corporation is a "factual" issue. (See para. 5, supra. for citation).

Defendant is asking only for a review of the motion made by the defendant to

confirm that it was only a factual motion, not a combined factual/legal motion. It is irrelevant whether the factual motion by defendant is correct or incorrect for purposes of double jeopardy. The only relevant issue is confirming that the defendant never asked for the legal relief of dismissing the Indictment. Since the defendant opposed the Judge's sua sponte dismissal of the Indictment, double jeopardy applies and bars retrial of this defendant. This defendant was entitled to a ruling by the one jury previously empaneled to a ruling on the case. Retrial by the government of this defendant before a second jury would place this defendant in jeopardy before a different jury when the dismissal was not requested by this defendant.

WHEREFORE, defendant Neal requests that this Court grant certiorari, and find that double jeopardy bars retrial of this defendant.

Respectfully submitted,

EDWIN A. NEAL, DEFENDANT
BY COUNSEL

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APPENDIX

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No. 94-6002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) ON APPEAL
Plaintiff-Appellant,	) from the
	) United States
v.	) District
	) Court for the
EDWIN A. NEAL,	) Western
	) District of
Defendant-Appellee.	) Kentucky

Decided and Filed August 9, 1996

Before: NORRIS and SUHRHEINRICH, Circuit Judges; WELLS, District Judge*

*The Honorable Lesley Brooks Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

SUHRHEINRICH, Circuit Judge. The principal issue in this appeal is whether jeopardy attaches to a district court's dismissal of an indictment upon defendant's motion for acquittal based on both a legal and factual ground. Because the district court relied exclusively on the legal ground raised by this defendant, we hold that double jeopardy does not bar appeal by the government. We therefore have jurisdiction over the government's appeal of the district court's dismissal

of the indictment, which we REVERSE for reasons to be discussed.

I.

Defendant founded United Security ("United"), with two other individuals in 1985. Defendant began exercising greater control over United's financial affairs, including tax matters, beginning in 1988. It is undisputed that defendant signed and filed United's quarterly tax returns[5] ("Form 941s" or "returns") for the periods ending in September 1988 and December 1988. He also signed all four 1989 quarterly returns. Several of the 1989 returns were filed late, and one of the checks submitted was dishonored by the bank. United apparently filed no return at all for the first quarter of 1990.

The government indicted defendant in April 1993 for failure to timely file Form 941s for four quarters in violation of 26 U.S.C. Sec. 7203, which imposes penalties on any "person" who fails to file a tax return when so required. Defendant's first trial began on September 21, 1993. During the second day of trial, defendant withdrew his plea of not guilty and entered a guilty plea to all counts. The district court accepted his guilty plea.

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[5]Form 941 is the Employer's Quarterly Tax Return, which documents federal income taxes and contributions under the Federal Insurance Contributions Act withheld from employee wages by an employer. 26 C.F.R. Sec. 31.6011(a)-1, 31.6011(a)-4 (West 1995).

Shortly thereafter, defendant hired new counsel, and filed a motion to withdraw his guilty plea. The district court allowed defendant to withdraw his plea and scheduled the case for trial.

Defendant went to trial for a second time on May 17, 1994. Defendant moved for acquittal at the close of the government's case. The district court called a conference in chambers, at which defendant stated the grounds for his motion. A written record of the conference is before us. Defendant explained that his motion was "based on several grounds, one of which is there is no legal requirement in existence under the law through the facts adduced so far that would show Mr. Neal had the duty or was under the duty to file the returns in question."

The district court then asked the government to clarify the legal basis for the indictment, specifically the requirement that the "person" referred to in Sec. 7203 file a return at all. The government responded that the duty to file a return was found in 26 U.S.C. Sec. 6672 or, alternatively, in 26 U.S.C. Sec. 6011(a). Upon review of these sections, however, the district court found that neither actually imposes a requirement to file a return. Section 6672 imposes civil penalties for persons who fail to pay or account for taxes, if they are required to do so. 26 U.S.C.A. Sec. 6672 (West Supp. 1996). Section 6011(a) merely specifies that when a person is required by regulations to file a return, the return must be filed according to the forms and regulations prescribed by the Secretary.

26 U.S.C.A. Sec. 6011(a) (West Supp. 1996). Frustrated by the government's inability to demonstrate the legal basis for prosecution, the district court dismissed the indictment:

> [C]ounsel for the government have quite honestly indicated they don't have any regulations that they can show this Court that would require a person in the position of Mr. Neal to file a return...

The district court dismissed the indictment because the government was unable to identify any underlying regulations requiring the corporation itself to file Form 941s, such that a corporate officer could be prosecuted as the "person" required to file the forms on behalf of the corporation. This appeal by the government followed.

II.

Although the double jeopardy issue is raised as a defense, we address it first because it concerns our jurisdiction to hear this appeal. Defendant argues that the government's appeal violates the Double Jeopardy Clause because the district court dismissed the indictment sua sponte without the defendant's acquiescence. The government counters that the trial court's dismissal was based on a purely legal theory advanced in a motion brought by defendant, and therefore the appeal does not violate double jeopardy. We review de novo whether double jeopardy bars appeal. **United States v. Ursery**, 59 F3d 568, 570 (6th

Cir. 1995), **rev'd on other grounds**, -- U.S.--, 1996 WL340815 (June 25, 1996).

The Double Jeopardy Clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Id. at 571 (quoting **United States v. Halper**, 490 U.S. 435, 440 (1989)). In jury trials, jeopardy attaches when the jury is empaneled and sworn. **Crist v. Bretz**, 437 U.S. 28, 38 (1978); **Downum v. United States**, 372 U.S. 734 (1963).

Notwithstanding, it is well accepted that double jeopardy does not bar all appeals after a jury has been empaneled. **See, e.g., United States v. Cameron**, 953 F2d 240, 243 (6th Cir. 1992)(holding that retrial of defendants following grant of mistrial justified by manifest necessity did not violate double jeopardy). The Supreme Court has held that in criminal cases, post-attachment appeals are generally available to the government when dismissal rests on a ruling of law sought by the defendant, unmixed with any factual basis for dismissal. **United States v. Scott**, 437 U.S. 82, 96-97 (1978); **see also United States v. Martin Linen Supply Co.**, 430 U.S. 564, 571 (1977)(holding that double jeopardy is only barred by acquittal when the ruling, whatever its label, actually represents a ruling in the defendant's favor of some or all of the factual elements of the offense charged). The Supreme Court has not directly addressed the procedural posture presented by this case; whether double jeopardy bars

a government appeal when a defendant brings a motion for acquittal based on legal and factual arguments and the court dismisses the indictment relying exclusively on the legal ground raised by the defendant.

Two circuit decisions, however, reinforce our conclusion that appeal is not barred in this case because no factual issues were resolved in defendant's favor. **Untied States v. Affinito**, 873 F2d 1261, 1264-65 (9th Cir. 1989); **United States v. Torkington**, 874 F2d 1441, 1444 (11th Cir. 1989). In **Affinito**, for example, the defendant had based his motion for acquittal on an intervening Supreme Court decision, which the defendant claimed had nullified the legal basis for the indictment. **Affinito**, 873 F2d at 1262. The district court had granted the defendant's motion, styling it an acquittal even though the motion had been based purely on a legal theory. **Id.**

The appellate court noted that although the district court characterized its order as an acquittal, the trial court "did not resolve factual elements in appellee's favor." **Id.** at 1264. Therefore, double jeopardy did not bar appeal because "the trial court's ruling was unrelated to the factual guilt or innocence." **Id.** Further, the lower court had acted at defendant's prompting, i.e., the filing of a motion for acquittal. The Ninth Circuit concluded that the case was within the purview of the Supreme Court's **Scott** and **Martin Linen** decisions and that the government was entitled to a new trial. **Id.** at 1265. **See also Torkington**,

874 F2d at 1444-5 (allowing appeal where grant of motion for acquittal was based solely on prosecutorial misconduct rather than on insufficiency of the evidence).

As in **Affinito** and **Torkington**, the district court here did not resolve any factual issue in defendant's favor. Defendant's motion for "acquittal" actually contained both a legal and a factual claim. The district court ultimately dismissed the indictment on the purely legal ground that there was no underlying duty to file Form 941s.

Defendant claims on appeal that he had "no input whatsoever as to the [judge's] decision to dismiss the indictment." If this were true, defendant would have a valid argument that dismissal was not sought by defendant, thus removing our case from the scope of the **Scott** and **Martin Linen** holdings into the murkier area of appeals from actual sua sponte dismissals.[6] We disagree, however, with

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[6]**Compare United States v. Dahlstrum**, 655 F2d 971 (9th Cir. 1981), **cert denied**, 455 U.S. 928, 973-75 (1982)(holding that appeal was barred where "judge was the instigator and the primary mover of the events ...[leading] to the dismissal" on legal grounds) **with United States v. Kennings**, 861 F2d 381, 385 (3rd Cir. 1988)(holding that double jeopardy did not bar appeal of a sua sponte dismissal where defendant did not initiate the proceeding, but "actively supported the judge's legal claim that the government's case against him must fail").

defendant's contention that he had "no input" in the trial court's decision. Defendant argued in the alternative, and the district court agreed with his legal argument. The fact that legal and factual arguments are raised in the same motion should not bar appellate review of dismissal as long as the district court confines itself to the legal issue. Because there was no fact-based acquittal, double jeopardy does not bar the government's appeal. We may therefore properly consider the merits of the government's argument. 19 U.S.C.A. Sec. 3731 (West Supp. 1995).

B. Government's Appeal

The government first argues that the district court erred in dismissing the indictment basically because other circuits have affirmed convictions of corporate officers for failure to file corporate returns. Although this is the ultimate issue in the government's case, the government's argument once again glosses over the district court's central concern and the basis for the dismissal: the source of the underlying legal obligation on the part of the corporation itself to file Form 941s such that a responsible corporate officer might be liable for failing to carry out such a duty on behalf of the corporation. Our review is de novo. **United States v. Brown**, 915 F2d 219, 223 (6th Cir. 1990).

Section 7203 of the Internal Revenue Code ("Code"), the statute under which defendant was charged, provides in relevant part:

> Any person required under this title to pay any estimated tax or tax, or required ... to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information...shall...be guilty of a misdemeanor and...fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year...

26 U.S.C.A. Sec. 7203 (West Supp. 1995).

On appeal, the government proffers another section of the Code and its accompanying regulations as the source of a corporation's duty to file Form 941s. Section 6011(a) of the Code state that:

> When required by regulations...any person made liable for any tax imposed by this title...shall make a return...

26 U.S.C.A. Sec. 6011(a)(West Supp. 1995).

In accompanying regulations, Sec. 31.6011(a)-1 requires:

> every employer required to make a return under the Federal Insurance Contributions Act...shall make a return for each subsequent calendar quarter...Form 941 is the form

> prescribed for making the return required by this subparagraph.

26 C.F.R. Sec. 31.6011(a)-1.

Section 31.6011(a) is potentially confusing because it reads circularly: an employer is required to make a return if it is required to make a return. Nonetheless, it is clear upon a close reading of the regulation that the word "return" is used interchangeably to mean both (1) a remittance of taxes withheld from employees, and (2) a specific form or statement documenting information required by the Secretary. Applying these meanings to Sec. 31.6011(a), an employer who has to "make a return" (send a remittance) of taxes withheld shall "make a return" (file a statement) on Form 941. Defendant does not contest that United was an employer required to withhold FICA and income taxes. **See** 26 C.F.R. Sec. 31.3121(d)-2 (defining employer); 26 U.S.C. Secs. 3102, 3402, and 3403 (requiring FICA and income tax withholding and making employer liable for payment of the taxes withheld). Because United was required to remit withheld taxes, it was also required to file Form 941s. United was therefore subject to the statutory mandate of Sec. 6011(a) that it "make a return or statement according to the forms and regulations prescribed by the Secretary."

Although it was not the basis for the district court's ruling the government also argues that the term "person" as used in Sec. 7203 encompasses responsible corporate officers. This question is easily answered by Sec. 7343 of the Code,

made applicable to Sec. 7203 by the express terms of Sec. 7343:

> The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C.A. Sec. 7343 (West 1989). Furthermore, other circuits have acknowledged that "person" as used in Sec. 7203 encompasses corporate officers responsible for filing the returns of the corporate "person." **Lumetta v. United States**, 362 F2d 644, 647 (8th Cir. 1966)(holding that whether an officer is responsible for filing a corporation's returns and therefore liable under Sec. 7203 for failure to do so is factual question); **Ryan v. United States**, 314 F2d 306, 309 (10th Cir. 1963)(affirming conviction under Sec. 7203). **See also United States v. Jasper**, 352 F.Supp. 254 (D.Del. 1972)(holding that corporate officers can be "persons": for the purpose of Sec. 7203 because Sec. 7343 explicitly includes corporate officers in its definition of "person"); **United States v. Ettorre**, 387 F.Supp. 582 (E.D.Pa. 1975)(relying on **Jasper** in imposing liability under Sec. 7203). We agree with these courts that corporate officers can be prosecuted under Sec. 7203 for failure to file the returns of a corporation.

Had the district court been presented an adequate explanation of the

regulations, it probably would have not dismissed the indictment and would have proceeded to the factual question of whether defendant in this case could be prosecuted as the individual required to file the corporation's returns.[7] Thus, the government did in fact have a legal basis for charging defendant under Sec. 7203, and the indictment was incorrectly dismissed by the district court.[8]

C. Defendant's Challenge to Denial of Motion for Acquittal

We now turn to defendant's other argument. He maintains that in any event, the evidence was insufficient to sustain his conviction, and that the district

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[7]The district court at one point stated:
This opinion of **Jasper**[352 F.Supp. 254 (D.Del. 1972] does not even address the issue of requirement to file. It only addresses whether or not the defendant is a person as used in [Sec. 7203]; and as we have indicated here, it is probable that the definition of a person is fact driven. But the legal obligation or requirement to file the return must be as a result of a legal obligation on the part of the Internal Revenue Code or regulations adopted under it.

[8]**See also Slodov v. United States**, 436 U.S. 238, 243 n.2 (1978)(assuming without analysis that 26 C.F.R. Sec. 31.6011(a)-1 and (a)-4 impose duty to file Form 941s; **Brewery, Inc. v. United States**, 33 F.3d 589, 591-92 (6th Cir. 1994)(same).

court should have granted his motion for acquittal. Before considering the merits of this argument, we must determine whether defendant's failure to file a cross appeal precludes consideration of this issue. A cross appeal is potentially required because if we were to hold that defendant's motion for acquittal should have been granted, we would be converting his dismissal without prejudice into a dismissal with prejudice, expanding the relief granted by the district court.

As a general rule, a cross appeal must be filed where an appellee wishes to attack part of a final judgment in order to enlarge his own rights or reduce those of his adversary. Charles A. Wright, et al., **Federal Practice and Procedure**, Sec. 3904 (1992)(citing **United States v. American Ry. Express Co.**, 265 U.S. 425, 435 (1924); **Francis v. Clark Equip. Co.**, 993 F2d 545, 552 (6th Cir. 1993). The requirement to file a cross appeal, when applicable is mandatory and jurisdictional in this circuit. **Ford Motor Credit Co. v. Aetna Casualty & Sur. Co.**, 717 F2d 959, 962-63 (6th Cir. 1983)(citing **Massachusetts Mut. Life Ins. Co. v. Ludwig**, 426 U.S. 479, 480 (1976)).

Although applied more frequently in civil cases, the general rule has been applied in criminal cases as well. **United States v. Lieberman**, 971 F2d 989 (3d Cir. 1992). For example, the Third Circuit noted the applicability of the rule in a criminal case where a defendant challenged the district court's ruling on grouping of multiple counts. **Id.** at 996-97. The appellate court stated:

> While a party may not seek more extensive relief on appeal than it received in district court without filing a cross-appeal, an appellee may proffer alternative arguments to support the district court's decision without filing a cross-appeal.

Id. at 997 n.5 (citations omitted). The Third Circuit ultimately held that the defendant's challenge was not precluded by his failure to file a cross appeal, because it was merely an alternative argument to justify the district court's downward departure as opposed to a request for more extensive relief. We find the Third Circuit's approach persuasive and apply it to the case before us. **Cf. United States v. El-Zoubi**, 993 F2d 442, 450 (5th Cir. 1993)(holding that government waived challenge to misapplication of sentencing guidelines in defendant's favor by failing to cross appeal.

Unlike the defendant in **Lieberman**, defendant in our case seeks more extensive relief than the district court ordered below. Defendant seeks modification of the denial of his motion for acquittal. This would be an "enlargement of rights" because it would transform the district court's dismissal without prejudice into a dismissal with prejudice. Therefore, because defendant did not file a cross appeal, we do not have jurisdiction to consider his argument that the district court erred in denying his motion for acquittal.

III.

Because the district court incorrectly dismissed the indictment against defendant, we **REVERSE** the July 1, 1994 order of the district court and **REMAND** for further proceedings.

No. 94-6002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	FILED
Plaintiff-Appellant,	)	SEP 10 1996
	)	
v.	)	LEONARD GREEN,
	)	CLERK
EDWIN A. NEAL,	)	
	)	
Defendant-Appellee.	)	

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and WELLS, District Judge.*

Upon consideration of the appellee's motion for extension of time until 9/13/96 to file a petition for rehearing,

It is ORDERED that the motion be and it hereby is **GRANTED**. The petition should be received in the clerk's office by 9/13/96.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Clerk

No. 94-6002
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	) FILED
Plaintiff-Appellant,	) OCT 03 1996
	)
v.	) LEONARD GREEN,
	) CLERK
EDWIN A. NEAL,	)
	) ORDER
Defendant-Appellee.	)

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and WELLS,********* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green, Clerk

*********Hon. Lesley Brooks Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No.
	)	93-00039-01-L
EDWIN A. NEAL,	)	
	)	
Defendant.	)	

TRANSCRIPT OF BENCH CONFERENCE
AND CHAMBERS PROCEEDINGS

****

BEFORE HONORABLE CHARLES R. SIMPSON III, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, KENTUCKY, ON JUNE 30, 1994.

****

[NOTE: Page references noted hereafter are to the page of the actual transcript, designated by a "Tr." followed by the page of the actual transcript. Only relevant portions of the transcript are reproduced here].

Tr. 13: THE COURT MET WITH COUNSEL IN CHAMBERS AT THE HOUR OF 1:40 P.M., ON JUNE 30, 1994, FOR THE FOLLOWING DISCUSSION:

THE COURT: We have a motion for acquittal.

MR. GREENE: Yes, we do.

THE COURT: State your motion.

MR. GREENE: Your honor, defendant moves for acquittal based on several grounds, one of which is there is no legal requirement in existence under the law through the facts adduced so far that would show that Mr. Neal had a duty or was under the duty to file the returns in question.

Also it does not appear that venue is proper in this court ...

Tr.14: Thirdly, in order to find Mr. Neal guilty, the jury has to believe beyond a reasonable doubt that Mr. Neal knew that he was the person under the duty...

Tr. 16: MR. GREENE: The government has not introduced the by-laws. We have no idea what they say. It would not be reasonable for a jury to conclude, a reasonable jury to conclude Mr. Neal was the person responsible for filing or could have filed the return for any of these quarters on

Tr. 17: time; and the same argument, once that date is past, there is no ability to violate this statute; and that would be the basis of my motion. Transcript at p. 16, 17, underlining added.

Tr. 26: THE COURT: All right. Then last is this legal-requirement argument. I told you all I had some reservations about this before the trial was adjourned this morning for lunch. What is your argument that the government hasn't shown a legal argument?

MR. GREENE: I'm sorry, Your Honor. I thought you were talking to the government.

THE COURT: No. Its your motion. I would like you to amplify what your grounds are before I ask them to respond.

MR. GREENE: Your Honor, Section 7203 makes it a crime for a person required to file a tax return to willfully fail to timely file such return. So only the person who is required to file the return can commit the

Tr. 27: crime.

Tr. 27: MR. GREENE: The government has cited Section 7343, which says that when the word, person, is used in this chapter, which includes Section 7203, it would also include the person under the duty to perform the act.

Now it doesn't explain who that person under

Tr: 28: the duty to perform the act is.

Tr. 33: THE COURT: First of all, with respect to the term, duty. What is the position of the government as to whether this is a legal or factual definition of the word, duty?

MR. CAMPBELL: Judge, in this context, the word, duty, is a factual determination; and the reason that I say that is that the last clause refers to a violation which occurs. The violation which occurs is the violation of the corporation or the employer. That is the violation. The duty of the particular officer or employee is a factual determination for the jury to decide if that person was the person within the corporation who was responsible for preventing the corporation's violation.

Tr. 35: THE COURT: So you think that whether or not Mr. Neal had a duty to file these for the corporation is a factual matter?

MR. CAMPBELL: Under 7343, correct.

THE COURT: Are you aware of any authority under 7343 which defines the parameters of the duty under 7343? In other words, how does one measure the duty? Does one apply one's common sense? Does one simply assemble a bunch of facts and from that, derive a duty; or is there any case authority that you're aware of that describes how and under what circumstances the duty under 7343 is to be defined?

MR. CAMPBELL: Judge, I'm not aware of any cases that define or give guidance to the Court on how the word, duty, under 7343 is to be applied in the trial setting.

THE COURT: Well, we have looked at a number of cases in which they have talked in terms of duty; and the cases seem to comment on facts, in other words, whether a person had control over books and records, corporate records, et cetera; but this would apply to factual determinations.

Tr. 38: MR. CAMPBELL: That it gives rise to a requirement for a person who is a responsible party to make a return on behalf of the corporation because he accepts responsibility to account for the taxes.

MR. GREENE: Does not say he has responsibility. It says: "Anyone with the responsibility..."

THE COURT: I'll hear from you in a minute.

Tr. 53: Mr. Greene: There's all sorts of case law on the issue. There is zero case law on the issue of who failed to file the return. That's why when I heard that, I was amazed that anyone could be prosecuted for failure to file a 941; and I was amazed to find any cases that anyone could be prosecuted for 941; and the two or three cases I found,

Tr. 54: 7343 was not an issue and people admitted they were the ones who had the duty to file the return. One was an attorney, and two were sole operating officers who essentially admitted it. We don't have that situation here.

THE COURT: Are you saying 6672 provides a penalty?

MR. GREENE: It does not create a responsibility. The responsibility is created on the basis of 6671(b), kind of a circular reasoning type thing. A person under the duty to perform the act - but how do you determine who that person is? And the case law under 6672 says that person is the one who controls the purse strings.

Tr. 56: MR. GREENE: Judge, the question you want to focus on is how does the duty arise. How did we know Mr. Neal had the duty? And the answer is, if we're going to use this 6672 as a model or analysis, then we would have to look at the by-laws of the corporation, which are not in evidence, almost say sine quo non.

The Court: Well, certainly the by-laws is one factor.

MR. GREENE: The factor though relates to collection of taxes, not who had the duty to file the return; and that is the problem here. There is no case law

on point. There's no instruction in any of the IRS publications, no regulations, nothing in the Internal Revenue Code that says who in the corporation has the duty to file.

Tr. 57: MR. GREENE: This is a case of first impression, that as far as I know, no one has ever - no one has ever tried to prosecute someone who resisted it on the ground of I'm not the person required. The case law that I found, the people admitted they were the person.

THE COURT: I agree with you, there is no authority directly on point that the prosecution anywhere has been able to find. The government has not been able to find any.

MR. GREENE: I wasn't the person required.

Tr. 58: MR. GREEN: There's also a duty to account for the money to the employee. But let's assume that is one of the three things included in the 6672. 6672 does not

Tr. 59: create that duty. It presupposes the duty, and we go back to what creates the duty.

THE COURT: The cases talk about that, they use the reasonable, responsible-person analysis to come up with a person that has that duty.

MR. GREENE: We're just focusing on one aspect, account for, and pay over. If we say account for is the same thing as filing the return, Slodov case indicates there are separate functions. They don't have to be done by the same person. So my argument is that there is no basis in the law that creates the duty to file a

return. You have to essentially look at the by-laws as the only - and that's what the - I think I have submitted jury instructions that the by-laws would be controlling to show who had the duty to do what in the corporation.

THE COURT: Well, this is a very difficult case. This is not just a simple failure-to-file issue, I think. Anyway let me consider these cases, and I will give you a ruling in a short period of time.

AFTER RECESS

THE COURT: I have kicked this thing around from one end to the other; and essentially, as I see it, the government seeks to hold the defendant liable under 7203 as a person who is required to make a return by the application of 6672, to the defendant as a person required

Tr. 60: to collect truthfully, account for, and pay over any tax imposed.

The government takes the position that 6672 imposes an obligation to file a return and articulates that that is something that must be read into the truthfully-account-for portion of the first phrase of Subsection (a) of 6672, and I find that just very difficult to accept. I am looking at the statutes and the cases that construe this section, starting with Slodov, which indicates that it is not required that a party responsible under 6672 must perform all three of the enumerated duties; but it does indicate that persons responsible under 6672 must be responsible for

collection of the third-party taxes.

Now we know that these words to some extent have particular meanings. We have looked at the legislative history of 6672. The word, collect, in there is meant to signal that these are not direct taxes but collections from third-party taxpayers, which are required.

We found no authority for the proposition that truthfully account for encompasses an obligation to file a return. I have looked at one late case from the Sixth Circuit, Kinnie v. United States, at 994 F2d 279, which says:

> "Two requirements must be met before one can be liable under Section 6672.
>
> Tr. 61: The taxpayer must be a responsible person under the statute and, two, have willfully failed to pay over the taxes due."

This again shows that 6672, in essence, is a payment-or-collection statute.

I have even taken to consulting the unabridged dictionary to try to find out what account for is, also Black's Law Dictionary. Black's Law Dictionary contains a citation for the proposition that account for means to pay over the money to the person entitled thereto. There are many nuances of the word, account for, in the unabridged dictionary. But looking at the context of this, the word, collect, means that the person who has the obligation under 6672 is a person required to obtain this money from third

parties, that is, in this case, employees and to pay over the tax imposed. Truthfully account for must mean that the person who collects it and is responsible for paying over must be accountable truthfully for what he has collected.

I recognize that the government says, well, one can evidence the truthfulness of the accounting by filing a return; but it is my feeling, from looking at the legislative history - part of it is recounted here in the Slodov case - that had Congress wished to impose a

Tr. 62: requirement of filing a return in 6672, they would have doe so clearly. This is in my judgment contextually not a requirement of filing of a return but the requirement that the person who collects from third parties must be accountable for what he collects and must pay the money to the government. But it does not specifically require the filing of a return.

There would be a certain analytical problem, I would also think, in indicating that in 6672, there is a requirement to file a return because if that is the case, the 7202 would criminalize the failure to file a return as a felony; and 7203 would arguably criminalize it as a misdemeanor without any distinction in the elements whatsoever.

In other words the decision to charge under 7202 and 7203, it is strictly up to the prosecutor without any dollar amount specified as to what was or was not a felony or a misdemeanor. I think that

would be an impossible situation.

I have scoured the books. I have scoured some articles. The cases - nothing in the cases that I have been able to find would suggest that 6672 requires specifically the filing of a return. Therefore, I must reject the government's notion that the requirement that Mr. Neal has to file a return that is necessary under 7203

Tr. 63: is found that that - I must reject the government's contention that that requirement is found in 6672.

The government also has mentioned 6011(a) in its brief, and we've talked about this to some extent; and I indicated earlier that in my view, 6011(a) requires the - makes a person who is liable for a tax, obligated to file a return; but that obligation is only when required by regulations prescribed by the secretary and its - counsel for the government have quite honestly indicated they don't have any regulations that they can show this Court that would require a person in the position of Mr. Neal to file a return if he should be liable for the tax; and I indicated that I thought it was possible he might be shown to be liable for the penalty under 6672 under the responsible-person theory but that there aren't regulations that buttress 6011(a) that have been brought to my attention.

I am uncomfortable with my ruling because it seems to me to be somewhat shocking to this Court that there doesn't seem to be a legal underpinning for

somebody who is a corporate official from willfully failing to timely file 941 forms, but I just don't see the legal requirements shown under the statute under which this individual is charged.

The notion that the aiding and abetting

Tr. 64: saves the government's case, I think, is eminently rejected right off. It is true that aiding and abetting is something that need not be specifically charged in addition to a substantive offense. But in this case, it would have to be shown that Edwin Neal aided and abetted himself since he is the one that is charged here.

To say that we can forget about the charge of Mr. Neal and contend that the corporation failed to file its taxes and that Mr. Neal aided and abetted the corporation would be to change the whole concept here of this case and the substantive aspect of it. So I do not feel we can simply tack on aiding and abetting here. The corporation is not a co-defendant charged with failing to file its taxes. Mr. Neal is the only one charge here.

So I don't see how we can simply impose an aiding and abetting on anything except the charge that is in the indictment; and since I am finding that that does not bear fruit for the United States, I don't see how we can instruct or consider that Mr. Neal may have aided and abetted anyone other than himself.

In other words the cat is trying to

chase its tail to throw in aiding and abetting and to enlarge or otherwise alter the aiding and abetting to indicate that Mr. Neal aided and abetted the corporation, which is not charged here just changes the whole tenor of the accusation

Tr. 65: in this indictment; and I don't think that that is proper.

So on that basis I recognize that there is the case of United States v. Jasper, which is from the district court in Delaware, which found that a person who, a defendant who admitted he was solely a person responsible for supervising, managing all aspects of the corporate business and was the president and sole operating officer, was a person who was obligated to file under 7203. But I don't find that there is any analysis in that decision at all. It simply says:

> "Under these circumstances there is no question the defendant was a person required by law to make and file the employer's quarterly tax returns for the corporation."

That may be, but we have already parsed the statute out, and we have not found in our analysis a legal requirement to file a return.

This opinion of Jasper does not even address the issue of requirement to file. It only addresses whether or not the defendant is a person as used in the statute; and as we have indicated here, it is probable that the definition of a

person is fact driven. But the legal obligation or requirement to file the return must be as a result of a legal obligation on the part of the Internal

Tr. 66: Revenue Code or regulations adopted under it.

So I am left with no choice in this matter but to grant the judgment of acquittal ;at the conclusion of the prosecution's case. Now ...

MR. CAMPBELL: Judge, if I could ask for clarification. My understanding is if there is no legal basis for the indictment, then the remedy is to dismiss the indictment. Judgment of acquittal is a finding that there is an insufficiency of facts to support the charge, and I think the Court is ruling there is no law to support the charge. So the proper remedy would be to dismiss the indictment.

THE COURT: Perhaps that's correct. Perhaps that's correct. I am not ruling that the evidence is insufficient. I am ruling that the government has not shown that there is a legal grounding for the charge here based on what has been shown so far in the case. So I was prepared and I am prepared to dismiss the indictment in the case; and, you know, I would certainly invite anybody that wants to to appeal because I think this is an area that there is virtually no law. And if you want to get the Sixth Circuit read on it, then you can do it.

MR. GREENE: Can I interpret Mr. Campbell's statement to be a motion by the

government to dismiss the indictment because I have not so moved?

Tr. 67: THE COURT: I don't know.

MR. CAMPBELL: Judge, we are not moving to dismiss the indictment. I think there is a legal issue, and the Court is ruling as a matter of law and not as a matter of fact.

THE COURT: Well, I don't know the nuance of acquittal. This used to be a motion for directed verdict until they changed the name. Whatever it is, I am not dismissing the indictment. I'm releasing the defendant from any bond that he's under and discharging the jury, and that's about the best I can do in a review of the legal situation here this afternoon. My law clerk has spent some time looking at this. That is the best explication I can give. There cannot be found any authority that I have been able to seize that would indicate that 6672 requires the filing of a return and that is together with my indication of 6011(a) the basis for my determination here.

If there is any requirement in 6672 for the filing of a return, it is so abstruse that this Court cannot find it. So there you have it.

MR. GREENE: Thank you, Judge.

THE COURT: Thank you for the opportunity of ruling. I will call the jury in after you all clear out. If you would go ahead and clear out of the courtroom.

MR. TAFT: Whatever.

MR. GREENE: Thank you, Judge. I will be packed up in a minute. Thank you.

AT 4:40 P.M., THE PROCEEDINGS WERE ADJOURNED.

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